STATE OF MICHIGAN

COURT OF APPEALS

LILLIAN HEARON,

Plaintiff-Appellant,

v

LAFAYETTE TOWERS APARTMENTS and SCHINDLER ELEVATOR CORPORATION,

Defendants-Appellees.

UNPUBLISHED
April 20, 2006

No. 259497
Wayne Circuit Court
LC No. 04-402650-NO

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiff, who allegedly fell and sustained injuries while disembarking from an elevator that was not leveling properly, appeals as of right from an order granting summary disposition to defendants under MCR 2.116(C)(10). The trial court ruled that plaintiff had not provided any evidence that defendants knew that the elevator would mislevel, nor any other evidence of negligence. We affirm.

We review a grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(10), we consider all the documentary evidence in the light most favorable to the nonmoving party to determine whether there is any genuine issue of material fact warranting a trial. *Id.* at 357-358. "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must . . . set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Whether a defendant owes a plaintiff a duty of care is also a question of law that is reviewed de novo. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). Statutory interpretation is likewise a question of law that we review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Because defendants concede that plaintiff was an invitee, defendant Lafayette Towers Apartments (Lafayette), the premises possessor, had a duty to protect her against any unreasonable risk of harm that it knew about or should have known about and that a reasonable person might not discover upon making a casual inspection. *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

Here, there is no indication that Lafayette had any notice of the misleveling problem on the day of the accident until *after* the accident. Plaintiff argues that Lafayette's notice on February 10, 2003 – three days before the accident – that the elevator was misleveling constitutes notice that this problem would continue. However, plaintiff's interpretation of the evidence ignores that defendant Schindler Elevator Corporation (Schindler), the party that repaired the elevator, notified Lafayette that it had fixed the problem. There is no evidence that anyone complained of the elevator misleveling on February 13, 2003, until after plaintiff's accident. Although plaintiff argues incorrectly that Schindler responded to two calls to repair the elevator for misleveling on the date of the accident, plaintiff's interpretation of the evidence is misleading. The first call on the day of the accident, made before the accident, which occurred around 4:30 p.m. on February 13, 2003, was made because the doors were opening slowly, and nothing indicates that the elevator was also misleveling. After repairing the problem, the technician indicated that he watched the elevator for problems for thirty minutes before leaving at 3:30 p.m., just one hour before the accident. Thus, instead of demonstrating that Lafayette knew of the misleveling problem, the record indicates that Lafayette had every reason to believe that the elevator had no problems just one hour before the accident. Accordingly, plaintiff has not established that Lafayette had actual notice of the dangerous condition before the accident.

Plaintiff also argues that defendant had "ongoing notice" of the misleveling problem. However, the evidence shows that the elevator was essentially inspected for problems before the accident, when Schindler's technician watched the elevator for problems after repairing the doors. Plaintiff has not demonstrated that Lafayette should have inspected the elevator during the one-hour interval from the door repair to the accident or that a later inspection would have disclosed the defect, and none of the evidence supports a conclusion that the earlier repair to the doors caused the misleveling problem. Also, there is no evidence from which to conclude that the repair for misleveling made three days before the accident was related to the misleveling that occurred on the day of the accident, and plaintiff did not supply any expert testimony in this regard. Under the circumstances, there is simply no evidence that would support a finding that defendant either knew or should have known of the misleveling problem that caused plaintiff's accident. Lafayette thus had no duty to prevent injury or to warn plaintiff of the danger. See *Prebenda, supra* at 169.

Although the parties dispute whether the dangerous condition was open and obvious, this issue is not material because the possessor did not have the requisite notice of the dangerous condition. Thus, defendant had no duty with respect to the dangerous condition even if the danger was a hidden danger. *Id.* Accordingly, the trial court properly granted summary disposition to Lafayette.

Plaintiff next argues that MCL 338.2159 permits recovery because either or both defendants violated a statutory duty, and the open and obvious doctrine does not apply to statutory duties. MCL 338.2159 provides that "[a] power elevator . . . shall be serviced and examined for defects by a licensed elevator journeyman at such periods as may be necessary, but not less than every 60 days, to maintain the equipment in safe operating condition."

Notably, plaintiff's statutory duty argument was not stated in plaintiff's statement of questions presented on appeal, and, therefore, it is not presented for appellate review. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Regardless, MCL 338.2159 cannot bar application of the open and obvious doctrine or be the basis for recovery here because the

statute was not violated. Plaintiff has not suggested that more than sixty days passed between any two elevator inspections, and the record indicates that Lafayette complied with the sixty-day requirement. Instead, plaintiff argues that the statute was somehow violated because "in spite of this [statutory] duty defendant failed to ensure that the elevator was properly leveling . . . . " While the requirement that inspections must be done "to maintain the equipment in safe operating condition" provides the *purpose* for the inspections, it does not establish that a violation occurs simply because an elevator malfunctions. Had the Legislature intended for MCL 338.2159 to require an elevator never to malfunction, it would have so stated.

Plaintiff also argues that expert testimony was not required to establish negligence because the doctrine of res ipsa loquitur applies. Plaintiff has not cited any authority in support of her res ipsa loquitur argument. Instead, plaintiff merely concludes that it applies and asserts that one of the defendants has conceded this point. However, she provides no indication regarding where in the record this point was conceded or by which defendant. Because plaintiff has not briefed this issue in any real sense, it has been waived. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) ("[i]t is not sufficient for a party simply to . . . assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments" [internal citation and quotation marks omitted]).

In any event, plaintiff has not established that the res ipsa loquitur doctrine applies. To establish that the res ipsa loquitur doctrine applies, a plaintiff must first establish that the event does not normally occur unless someone has been negligent. *Woodard v Univ of Michigan Med Ctr*, 473 Mich 1, 7; 702 NW2d 522 (2005). Further, "the fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury." *Id.* (internal citation and quotation marks omitted.) Here, plaintiff has not provided any expert testimony, nor can it be said that elevator maintenance is within the common understanding of the average juror.

Finally, the trial court also properly granted summary disposition to Schindler because plaintiff did not allege any duty owed to her by Schindler separate and distinct from its service contract with Lafayette. See *Fultz, supra* at 469-470.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter